No. 22,202

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT E. LEUTHOLD, Superintendent of Banks, State of Montana, Helena, Montana, SECURITY BANK and MINERS BANK OF MONTANA, N. A.,

Appellants,

v.

WILLIAM B. CAMP, Comptroller of the Currency,

Appellee,

and

THE FIRST NATIONAL BANK OF BUTTE and DALY NATIONAL BANK OF ANACONDA,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

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I N D E X

CITATIONS

Statutes and Rules Continued:

Miscellaneous:

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JURISDICTIONAL STATEMENT

This is an action for declaratory and injunctive relief by the Superintendent of Banks of the State of Montana and two Montana banks, attacking the approval by the Comptroller of the Currency of the consolidation of two national banks (I.R. 2-8 1/).

1/ "I.R." refers to volume I of the Transcript of Record. Volumes II and III contain the trial transcript.

The jurisdiction of the district court was invoked under 5 U.S.C. 1009 and 28 U.S.C. 1331, 1337, 1346, 1348 and 2201 (I.R. 2). An opinion and order denying plaintiff all relief was filed on August 29, 1967 (I.R. 54), and a notice of appeal was filed on behalf of all plaintiffs on the same day (I.R. 66). A final judgment "nunc pro tunc" was entered on November 8, 1967, which purported to be "as of August 29, 1967." 2/ The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

This action arises out of an application to the Comptroller of the Currency, dated October 1, 1966 (Pl. Exh. 10 3/), to consolidate two national banks. The First National Bank of Butte, Montana (hereafter "First National") was organized in 1877 and became a national bank in 1881. The Daly National Bank of Anaconda, Montana (hereafter "Daly") was organized in 1883 and became a national bank in 1965 (Def. Exh. G); Daly is a subsidiary of Northwest Bancorporation, a Minnesota bank holding company (Def. Exh. F). The application requested permission for Daly to acquire the assets of First National in order to form a single consolidated bank under Daly's charter, with the title of "First National Bank" (ibid.); permission was also asked to maintain the existing offices of each bank.

2/ Apparently, no copy of this judgment was included in the reproduced record. We call this Court's attention to the fact that no notice of appeal was filed subsequent to the final judgment; the Court may wish to consider whether it has jurisdiction to entertain the appeal. See Rules 58 and 73(a), Fed. R. Civ. P., 28 U.S.C. 1291.

3/ "Pl. Exh." and "Def. Exh." references are to plaintiffs' and defendants' exhibits introduced at trial (see list of exhibits in Appendix G to Appellants' Brief, App. 12). These exhibits are not reproduced in the Transcript of Record.

Since the proposed consolidation involved an acquisition of the assets of one national bank by another, and since the resulting bank was to be a national bank, the Comptroller requested reports on the competitive factors involved from the Department of Justice, the Federal Reserve Board and the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. 1828(c)(4). No significant anticompetitive effect was noted by these agencies (see Pl. Exh. 12; Def. Exhs. F, G). The Department of Justice "concluded that the proposed consolidation will not materially alter the competitive situation in either of the areas served by the applicant banks and will not have an adverse effect on competition" (Def. Exh. G).

Appellants, the Superintendent of Banks in Montana and two competing banks located in Butte, commenced this action against the Comptroller on November 23, 1966. The complaint sought a declaration that the proposed maintenance of two offices by the resulting bank violated 12 U.S.C. 36 and 81, and that the consolidation itself violated the Bank Holding Company Act, 12 U.S.C. 1842. It also sought a permanent injunction against approval of the consolidation, a preliminary injunction pendente lite, and a temporary restraining order (I.R. 8). A separate motion for a preliminary injunction and a temporary restraining order was also filed (I.R. 13). First National and Daly then intervened as defendants (I.R. 32).

By agreement of the parties (I.R. 28, 39, 79), the issuance of a final certificate by the Comptroller was postponed, and thus the request for a temporary restraining order was not pursued by plaintiffs. On March 16, 1967, the Comptroller did issue his

decision approving the proposed consolidation. The decision stated in part (Def. Exh. F):

> On consummation of this consolidation, the resulting bank plans to operate the office of the First National Bank of Butte as a branch. By this means, the resulting bank will bring to the area a new banking institution with higher lending limits which will permit the offering of larger credit lines to the community. Home and installment loans, not now offered by the First National Bank of Butte, will be among the services to be offered by the resulting bank and will intensify the competition among the banks located in Butte.
>
> * * * * *
>
> Applying the statutory criteria to this proposal, which appears to be lawful under Federal and State statutes, it is concluded that the proposal is in the public interest and the application is, therefore, approved.

All parties then moved to dismiss or for summary judgmen (I.R. 33, 34, 37). The district court reserved decision on al motions (I.R. 80) and a trial was held. On August 29, 1967, a opinion and order was entered by Judge Russell E. Smith denyin plaintiffs all relief (I.R. 65). The court found as a fact th the consolidation would lead to increased competition in the Butte area (I.R. 52). It held as a matter of law that the mai tenance of separate offices was proper under 12 U.S.C. 36(c) a under State law (I.R. 58-63), and that the Bank Holding Compan Act did not prohibit the consolidation (I.R. 63-65). This appe was then taken (I.R. 66).

Appellants' motion in the district court for a stay pend appeal was denied, since the court found that no irreparable damage would occur from the consolidation and that the public interest would not be served by a stay (I.R. 69-70). This Court (Merrill, Browning and Duniway, JJ.) denied appellants'

urther motion for an injunction pending appeal on October 6, 967, and the final certificate was issued by the Comptroller n October 11. The consolidated bank opened for business on ctober 16, 1967.

STATUTES INVOLVED

12 U.S.C. 36(b)(2) provides in part:

> (2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as --
>
> > (A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation * * *.

12 U.S.C. 36(c) provides in part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said assodation is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *

12 U.S.C. 1842 provides in part:

> (a) It shall be unlawful, except with the prior approval of the Board, * * * (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; * * *.
>
> (d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. * * *

Section 5-1021, Revised Code of Montana, provides in part:

> Consolidation of banks. Any two or more banks doing business in this state, may, with the approval of the superintendent of banks, in the case of state banks, consolidate, join and merge into one bank under, into and with the charter of either existing bank hereinafter referred to as the consolidated bank, on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each bank proposing to consolidate, and be ratified and confirmed by the consent in writing of the shareholders of each such bank owning at least two-thirds of its capital stock outstanding; provided, that the capital stock of such consolidated bank shall not be less than that required under existing law for the organization of a bank of the class of the largest of the banks so consolidating.
>
> Upon such consolidation the corporate franchise, corporate life, being and existence, and the corporate rights, powers, duties, privileges, franchises and obligations including the rights, powers, duties, privileges and

obligations as trustee, executor, administrator, guardian and all and every right, power, duty, privilege and obligation as fiduciary together with title to every species of property, real, personal and mixed, of such consolidating bank and banks shall, without the necessity of any instrument of transfer, be and become merged and continued in and held, enjoyed and/or assumed by the consolidated bank, and such consolidated bank shall have and enjoy the right equal as to priorities with any other applicant to appointment by the courts to the offices of executor, administrator, guardian and/or trustee under any will or other instrument made prior to such consolidation and by which will or instrument such consolidating bank was nominated by the maker to such office.

Section 5-1028, Revised Code of Montana, provides in part:

No bank shall maintain any branch bank, receive deposits or pay checks, except over the counter of and in its own banking house.

Section 5-1124, Revised Code of Montana, provides:

When any two or more banks located in the same county or in adjoining counties shall consolidate in accordance with the provisions of section 5-1021, the consolidated bank may, if it has a paid up capital of seventy five thousand dollars ($75,000.00) or more, upon the written consent of the superintendent of banks and under rules and regulations promulgated by him, maintain and operate offices in the locations of the consolidating banks.

SUMMARY OF ARGUMENT

Appellants make two basic attacks on the approval by the Comptroller of the consolidation of Daly and First National. First, they contend that state law prohibits the maintenance of separate bank offices after the consolidation of two banks. Second, they argue that the Bank Holding Company Act prohibits the consolidation ab initio. As we will show below, the district court correctly held that neither of these contentions is valid. Montana law expressly allows a consolidated bank to "maintain and operate offices in the locations of the consolidating banks," which includes the carrying on of the business of banking in these locations. Mont. Rev. Code 5-1124. And the Bank Holding Company Act, 12 U.S.C. 1842(a)(4), exempts acquisitions of the assets of one bank by another from the terms of the act. State of South Dakota v. National Bank of South Dakota, 335 F. 2d 444, 448-449 (C.A. 8), certiorari denied, 379 U.S. 970.

ARGUMENT

I. MONTANA LAW PERMITS A CONSOLIDATED BANK TO MAINTAIN OFFICES IN THE LOCATIONS OF THE CONSOLIDATING BANKS, AND THESE OFFICES MAY CARRY ON ALL BANKING ACTIVITIES.

Appellants concede, as they must, that "it is now well settled that national banks may maintain branch banks to the same extent as state banks." Appellants' Brief, p. 13; see 12 U.S.C. 36(b)(2), 36(c); First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252. Therefore, the sole question with respect to the maintenance of separate offices

s whether Montana law permits state banks to do what Daly and irst National have been permitted by the Comptroller to do -- .e., whether state banks which consolidate may maintain and perate offices in the locations of the consolidating banks for ne purpose of carrying on the business of banking.

A. The Express Language Of Section 5-1124 Of The Montana Revised Code Authorized The Action Of The Comptroller In Approving The Consolidation.

In 1927, Montana enacted a law generally prohibiting branch anking. Mont. Rev. Code 5-1028. 4/ Four years later, the egislature enacted Section 5-1124 of the Revised Code of ontana, which provides (emphasis added):

> Maintenance of offices of consolidated banks. When any two or more banks located in the same county or in adjoining counties shall consolidate in accordance with the provisions of section 5-1021, the consolidated bank may, if it has a paid up capital of seventy-five thousand dollars ($75,000.00) or more, upon the written consent of the superintendent of banks and under rules and regulations promulgated by him, maintain and operate offices in the locations of the consolidating banks.

s appears from the plain terms of this Section, the legislative ntent was to allow the consolidated bank to continue to "main- ain and operate" its existing "offices" in the places where hey were operating before the consolidation, i.e., "in the lo- ations of the consolidating banks."

Appellants contend, however, that the legislature must be ssumed to have intended to allow something less than the carrying n of a regular banking business in the existing offices, since : "did not use the word branch bank; it used the word office"

4/ According to appellants' brief (pp. 18-19), this Act was

(Appellant's Brief, p. 24; emphasis in original). But it is manifest upon analysis that the use of the term "branch bank" would have been inappropriate to effectuate the legislative objective of permitting the existing offices of the consolidating banks to continue to carry on the same banking activities they had conducted before the consolidation. What appellants ignore is that, after consolidation, all of the existing offices cannot logically be termed "branch banks." At least one of them must be a main office, and the others must be, in effect, branch offices. 5/ To be sure, the legislature might have dispelled all possible doubt by providing that: "[T]he consolidated bank may * * * maintain and operate a main office in the location of one of the consolidating banks and branch offices in the location of the other consolidating banks." That it did not do so, however, can give little comfort to appellants. There was no reason for the legislature to foresee appellants' attempt to read the word "offices" as meaning something less than the terms "main office" and "branch office." In common parlance, after all, an office of a bank is a place where the bank conducts the normal business of banking. 6/

4/ (Cont'd from previous page) excluding "relatively sophisticated cities such as Butte * * *." It is therefore unlikely that the legislature, even in enacting this general prohibition against branching, contemplated a prohibition against consolidating banks in larger cities remaining in the banking business.

5/ Thus, in the instant case, Daly would be considered the main office, since the consolidation took place under its charter, and First National would be the branch office.

6/ See Appellant's Brief, p. 22, for the text of an Iowa statute allowing the establishment of an "office for the sole and only purposes of receiving deposits and paying checks and for performing other clerical and routine duties not inconsistent with this section." Iowa Code Ann. 528.51. Surely the Montana legislature could have

In this connection, it is significant that there are other Montana statutory provisions in which the word "office" is used to connote a place where banking business is carried on. See, e.g., Mont. Rev. Code 87A-4-102, 87A-4-106; compare 12 U.S.C. 36(b)(2); First Hardin National Bank v. Fort Knox National Bank, 361 F. 2d 276, 278 (C.A. 6), certiorari denied, 385 U.S. 959, where the word "office" is used in the same manner. And, in their complaint, appellants use the word "office" four times in this sense (I.R. 3-4, pars. 3, 4, 6, 7). The district court was therefore correct in concluding that "the word 'office' describes a place where banking business is done," "because in Montana, at least, there is no other image of a bank office" (I.R. 60, 61).

B. Appellants' Interpretation of Section 5-1124 Cannot Be Squared With Other Indicia Of The Legislature's Intent.

While we do not believe that this Court need go beyond a consideration of the terms of Section 5-1124 to uphold the determination of the court below, the fact is that there are other concrete indicia of a legislative intent to permit the existing offices of consolidated banks to continue the banking business in which they were engaged at the time of consolidation.

Most persuasive is the fact -- which is understandably totally ignored by appellants in their brief -- that appellant Leuthold, the Superintendent of Banks, after the commencement of this lawsuit, attempted without success to effect the repeal of Section 5-1124 by the State legislature for the purpose of foreclosing this very consolidation. H.B. 509 (Def. Exh. C)

was entitled "An Act To Repeal Section 5-1124 R.C.M. 1947, Relating To Maintenance Of Offices Of Consolidated Banks." Mr. Leuthold appeared before the House Committee on Banking and Industry of the Montana House of Representatives and testified on behalf of H.B. 509 (Def. Exh. B). In urging the repeal of Section 5-1124, he informed the legislators of the proposed consolidation and proposed maintenance of two offices by the consolidated bank in the instant case. He also informed them that Daly and First National claimed authority to operate these offices under Section 5-1124. He gave his opinion that such operation violated Montana law; that, if the consolidation were consummated on the basis set forth in the application, it would have dire results for the Montana banking industry; and that Section 5-1124 was "no longer needed and serves no useful or constructive purpose." He further stated that "if the legislature kills H.B. 509 or does nothing about it, it will have a bearing on the pending court case."

Notwithstanding these representations, the Montana House of Representatives indefinitely postponed H.B. 509 on February 1967, upon adoption of the report of the Committee of the Whole. (Def. Exh. C). In these circumstances, it is a reasonable -- if not compelled -- inference that the legislature approved of the maintenance of separate offices after consolidation under Section 5-1124. 7/ This much cannot be disputed: with full

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7/ Chapter No. 72, Montana Session Laws 1967, House Bill 205 (Def. Exh. A), passed by the legislature in February, 1967, recognizes that deposit liability may be carried by a Montana bank "at each of its said banking offices" within the state. This is further confirmation that Section 5-1124 was intended to allow full banking facilities to be maintained in each office of the consolidated bank.

nowledge of the reliance of Daly and First National upon Section -1124 and with the Superintendent's express warning that its ction or inaction would have a bearing upon the consolidation f the banks, the legislature nevertheless declined the invitaion to repeal the Section. There is, therefore, no good reason hy this Court should in effect repeal the Section -- which, as he judge below pointed out, in terms authorizes the consolidaion. 8/

It should be added that the "horrors" of branch banking llegedly felt by the 1931 Montana legislature (e.g, Appellants' rief, p. 19) are quite beside the point. The consolidation in his case and the maintenance of two offices by the resulting ank leaves the same number of bank offices as were in existence efore the consolidation. Thus, the public will not be deprived f a place in which to do its banking business which existed beore the consolidation. With this distinction between consolidaion and branching in mind, Sections 5-1124 and 5-1028 (the branch anking provision) may easily be reconciled.

/ On September 29, 1966, (just two months prior to the institution of this action), the Attorney General of the State of ontana ruled, in response to a letter from the appellant Superntendent of Banks, that consolidating national banks could not aintain more than one office under Section 5-1124 (Pl. Exh. 1). ince 12 U.S.C. 36(c) only refers to "the statute law of the tate" with respect to determining whether national banks should e permitted to operate a branch, administrative opinions should ot be considered. See Union Savings Bank of Patchogue v. Saxon, 35 F. 2d 718, 723 (C.A.D.C.); Howell v. Citizens First National ank of Ridgewood, 385 F. 2d 528 (CA. 3); but cf. Lincoln Bank Trust Co. v. Exchange National Bank, 383 F. 2d 694 (C.A. 10). urthermore, even under Montana law an executive construction of statute is only upheld "if not erroneous." See State v. Schye, 30 Mont. 537, 541, 305 P. 2d 350, 353; compare State ex rel. arr v. District Court, 108 Mont. 433, 436, 91 P. 2d 399, 400. he Attorney General's opinion was properly discounted by the istrict court (I.R. 63).

Section 5-1021, the consolidation section referred to in 5-1124, also demonstrates the intent of the legislature to allo the maintenance of separate offices after consolidation and the exercise of full banking privileges therein. Section 5-1021 pr vides that "the corporate franchise, corporate life, being and existence, and the corporate rights, powers, duties, privileges franchises and obligations * * * of such consolidating bank and banks shall * * * be * * * merged and continued in * * * the consolidated bank * * *." One of the "privileges" possessed by both Daly and First National prior to the consolidation was the privilege of operating a banking office which carried on all banking activities. Section 5-1021, with its broad language co ferring powers upon the consolidated bank, should be viewed as a general grant of authority to the resulting bank to carry on its operations as before, absent a specific prohibition by the legislature. Section 5-1124, far from being a specific prohibi tion, is instead a specific sanction for the consolidated bank to exercise the privilege of the consolidating banks and there- fore to maintain and operate the existing offices in the same way as was done before. When these two sections are read toget it becomes clear that the legislature intended, as a general matter of banking policy, to allow existing offices to continue to operate as before, and therefore, to continue to provide fu banking services to the public. 9/

9/ Other states have exhibited this same policy of allowing existing offices to remain in operation after consolidation despite a general prohibition against branching. E.g., Utah Code Ann., Title 7, ch. 3, § 6. Where the policy has been to the contrary, the state legislatures have clearly said so. See, e.g. Iowa Code Ann. 528.51, note 6 , supra.

Finally, appellants' construction of Section 5-1124 would render it a nullity. As the court below pointed out, "there is not now, and was not in 1931, any law which forbad banks from maintaining offices wherever they chose so long as they did not conduct a banking business in them" (I.R. 62). Thus, the characterization of Section 5-1124 as allowing offices "for the transaction of business of a routine character, which does not require the exercise of discretion" (Appellants' Brief, pp. 17-18), ascribes to the legislature the intent to allow only that which was already allowed. Such a construction should not be accepted, especially when there is a clear and logical alternate construction.

In summary, the express words of Section 5-1124 allow the maintenance and operation of offices in the existing locations of the consolidating banks, which offices can carry out full banking functions. This interpretation fully squares with the banking policy of the Montana legislature from 1931 to the present. It follows that the Comptroller was acting within his statutory authority in permitting the consolidated bank to maintain the existing offices of the consolidating banks. The district court was clearly correct in upholding the Comptroller's decision.

II. THE BANK HOLDING COMPANY ACT IS INAPPLICABLE WHERE, AS HERE, ONE BANK ACQUIRES ANOTHER BANK.

It is undisputed that the acquisition in question involved the transfer of the assets of First National to Daly (I.R. 55; Pl. Exh. 10). It is also conceded by appellants that Daly "is not a sham entity" (Appellants' Brief, p. 45). Nevertheless,

appellants argue that the Bank Holding Company Act prohibits th acquisition because Daly is owned by Northwest Bancorporation, a bank holding company located in Minnesota. In light of the fac that the relevant portion of the Act, 12 U.S.C. 1842(a)(4), exempts acquisitions by a bank from the terms of the statute, appellants urge this Court to "pierce" the transaction and find a violation regardless of the literal wording of the Act. As we now show, appellants have misconceived the nature of the regulatory scheme, and their argument is therefore without merit.

A. The Bank Holding Company Act Itself Contains An Explicit Exception For The Kind Of Transaction Which Took Place Here.

When a national bank acquires another national bank, as wa the case here, the approval of the Comptroller of the Currency i expressly required by statute. 12 U.S.C. 1828(c)(2)(A). Within this regulatory scheme, the Comptroller must also seek the views of the Department of Justice, the Federal Reserve Board and the Federal Deposit Insurance Corporation before approving the acqui sition. 12 U.S.C. 1828(c)(4). And, as discussed in Part I, sup when the resulting bank wishes to maintain both of the pre-acquisition offices, 12 U.S.C. 36(b)(2) and 36(c) require the Comptroller to look to state law in order to determine whether the operation of two separate banking offices is proper.

When an acquisition is made by a bank holding company, however, the Federal Reserve Board is the agency charged with approving or disapproving the acquisition. 12 U.S.C. 1842(a). And acquisitions which cross state lines must again be "specifically authorized by the statute laws of the State in which such [acquired] bank is located * * *." 12 U.S.C. 1842(d).

This division of regulatory functions is spelled out in 12 U.S.C. 1842(a)(4) (emphasis added):

> (a) It shall be unlawful, except with the prior approval of the Board, * * * (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank * * *.

This section plainly exempts a bank's acquisition of another bank from the need for approval by the Federal Reserve Board, so that this type of acquisition is only regulated by one agency, the Comptroller of the Currency. 10/ Section 1842(d), therefore, is inapplicable to the instant case, for it is merely "a legislative direction to the Board and does not in any way enlarge on the provisions of (a)." First National Bank in Billings v. First Bank Stock Corp., 197 F. Supp. 417, 422 (D. Mont.), affirmed, 306 F. 2d 937 (C.A. 9). Since approval is not necessary at all in the instant case because of Section 1842(a)(4), the claim that Section 1842(d) prohibits the acquisition in question (Appellants' Brief, pp. 42-44) is without substance.

This reading of the Bank Holding Company Act has been expressly approved by the Court of Appeals for the Eighth Circuit. In State of South Dakota v. National Bank of South Dakota, 335 F. 2d 444, affirming 219 F. Supp. 842 (D.S.D.), certiorari denied, 379 U.S. 970, the State of South Dakota attacked the Comptroller's

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10/ The Federal Reserve Board unsuccessfully attempted to have this exemption deleted from the Act. See Fed. Res. Bull., July, 1958, pp. 787-789; 47th Annual Rep. of the Federal Reserve Board, 1960, pp. 98-99; Hearings on Bank Holding Company Legislation, House Committee on Banking and Currency, 88th Cong., 1st Sess., Vol. 2, pp. 353-362.

approval of the acquisition of the assets of three state banks a national bank and the maintenance of branches at the existing offices of these state banks. The national bank was owned by a bank holding company. The district court held that "the phrase 'other than a bank' in * * * [12 U.S.C. 1842(a)(4)] creates an exception to the restrictions contained in the remainder of the statute. The exception applies when the assets of a bank are acquired by a bank which is a subsidiary of a holding company." 219 F. Supp. at 853. The Eighth Circuit expressly ratified the conclusion of the district court, and affirmed the approval by the Comptroller (335 F. 2d at 448-449):

> The words in the statute "other than a bank" clearly show the intention of Congress not to require a bank acquiring the assets of another bank to obtain Board approval. The remaining subsections of § 1842, including subsection (d) largely relied upon by the plaintiff, set forth the procedures to be followed where an application to the Board of Governors is required. The words of subsection (d) reading: "no application shall be approved under this section" manifest a Congressional intention that the section only applies to instances where approval of the Board of Governors is required. As Judge Mickelson points out, such interpretation is substantiated by the legislative history and the administrative interpretation of such provisions by the Board of Governors.

It should be noted that, while the court below relied upon the South Dakota decision (I.R. 64), appellants do not even refer to it in their brief. 11/

11/ The attempt to distinguish the South Dakota case by amici curiae (Br., pp. 6-7) is utterly devoid of merit. While it may be that the Comptroller was not a party in South Dakota, the fac remains that the precise sections of the Bank Holding Company Act here involved were given exactly the same interpretation by the Eighth Circuit as urged by the Comptroller in this case.

Appellants clearly cannot prevail in their contention that Section 1842(d) prohibited the acquisition of the assets of First National by Daly in the instant case.

B. There Is No Occasion To View The Consolidation As An Acquisition Of First National By The Holding Company.

Appellants would avoid the clear statutory language of Section 1842(a)(4) by asking the Court to "pierce the corporate veil" and hold that the acquisition was really by Northwest Bancorporation, the bank holding company. However, as we have shown above, the difference in the form of acquisition is the touchstone of the regulatory scheme. The manifest intent of Congress was to regulate bank acquisitions through the Comptroller and holding company acquisitions through the Federal Reserve Board. State of South Dakota v. National Bank of South Dakota, supra, 335 F. 2d at 449. Therefore, the statutory scheme is fully served by appellees' construction of the Bank Holding Company Act.

Appellants' identical contention was made in South Dakota, supra (335 F. 2d at 449):

> Plaintiff urges that the corporate veil should be pierced and that the transaction should be treated as an acquisition by the holding company rather than by the bank. The trial court properly rejected such contention, stating that no subterfuge was here involved. National Bank [the acquiring bank] is a separate corporation. It has held a national charter for many years and is to continue as the surviving bank. It serves a definite corporate purpose, separate and distinct from the holding company. First Bank Stock Corporation has existed as a separate corporation owning stock of national and other banks for a considerable period of time. In this respect, this case differs materially from Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra [323 F. 2d 290 (C.A.D.C.), reversed, 379 U.S. 411].

This is precisely the situation in the instant case. Both banks have been in existence for over eighty years. Northwest Bancorporation is an established bank holding company. Thus, the facts in this case are indistinguishable from those in South Dakota.

Finally, in a similar case, this Court was asked to "pierc" a comparable veil and hold that the ownership of two banks by a bank holding comapny could cause one bank to act as the branch of the other. This contention was rejected, First National Bank in Billings v. First Bank Stock Corp., 306 F. 2d 937, and there is no reason for a different result here.

C. Even If The Bank Holding Company Act Were Applicable To The Instant Acquisition, It Does Not Confer Litigable Rights Upon Private Parties Except According To Its Terms, Which Do Not Include Civil Enforcement.

A "party aggrieved" may obtain review of an adverse decision of the Federal Reserve Board under 12 U.S.C. 1848. Otherwise, the Act is enforceable by its terms only through the imposition of criminal penalties under 12 U.S.C. 1847. The Eighth Circuit, in the South Dakota case, supra, expressly held that private litigants could not invoke the Act in an attempt to invalidate a bank merger, since the criminal provisions were exclusive (335 F. 2d at 447-448; emphasis added):

> The Bank Holding Company Act contains no express provision for civil enforcement. The legislative history of the Act as shown by Judge Mickelson's opinion supports the defendants' view that Congress intended the criminal enforcement provision to be exclusive. * * * The history of the legislation is sketched in Senate Report No. 1095, July 25, 1955; 2 U.S. Code Cong. & Admin. News (1956), pp. 2482-2513.

In an earlier proposed Bank Holding Company Bill, S. 310, 77th Congress, express provision is made for civil enforcement of any liability or duty and for injunctive relief.

At various hearings before Congressional committees, Governors of the Federal Reserve System charged with the administration of the Act advocated criminal penalties as the exclusive means for enforcement. Governor Robertson, appearing before the Committee on behalf of the Board on June 24, 1952, stated:

> "Bearing always in mind the desirability of keeping the legislation to a minimum, it is our feeling that the only essential measure of enforcement, and the most effective one, would be a provision for criminal penalties for violation of the statute or of conditions prescribed by the administering agency in granting consent to acquisitions of bank stocks. <u>This would place complete responsibility for enforcement of the law in the Department of Justice</u>. The administering agency would not be placed in a position in which it would be required to institute proceedings for enforcement." Hearings Before the House Committee on Banking and Currency, 82d Cong. 2d Sess., on H.R. 6504 (June 24, 1952), pp. 26-27.

Similar statements were made at subsequent hearings in subsequent years. Hearings Before the Senate Committee on Banking and Currency, 83d Cong., 1st Sess., on S. 76 and S. 1118, p. 17; Hearings Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., on S. 880, S. 2350 and H.R. 6227 (July 5, 6, 7, 11, 12, and 14, 1955), p. 61; Hearings Before the Committee on Banking and Currency, United States Senate, on Nomination of William McChesney Martin, Jr., 84th Cong., 2d Sess., pp. 36, 37.

<u>Thus it appears that the Act and its legislative history disclose no intent on the part of Congress to create rights to be enforced by civil litigation</u>.

As the above-quoted passage clearly points out, Congress did not intend the provisions of the Bank Holding Company Act to confer litigable rights upon private parties, Therefore,

even if appellants' contentions had some substance (which, as we showed above, they do not), they could not be raised here.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed. 12/

Respectfully submitted,

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12/ It should be noted that the instant appeal is not merel from the denial of a motion for a preliminary injunction, but from an order which states (I.R. 65): "On the merits IT IS ORDERED that plaintiffs be denied all relief." Appellees' motions for summary judgment or to dismiss were not granted because a trial on the merits was held and judgment given for defendants-appellees. Thus the entire case is before this Court.

CERTIFICATE

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the United tates Court of Appeals for the Ninth Circuit, and that, in y opinion, the foregoing brief is in full compliance with hose rules.

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STEPHEN R. FELSON, being duly sworn, deposes and says:

That on March 21, 1968, he caused three copies of the oregoing Brief for the Appellee to be served by air mail, ostage prepaid, upon counsel for appellant and intervenors-appellees as follows:

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[Seal]

NOTARY PUBLIC
y Commission expires April 14, 1972.